Supreme Court, U.S.
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No. 97-

In The
Supreme Court of the United States
OCTOBER TERM, 1997

James Kirk, And Marcia Kirk
Donna Sue Gall, And
Patty Hummer, Together With
The Remaining Property Owners
Who Are Signatories Hereto And
Who Are In the Caption Of This Complaint,
Petitioners

v.

The Town Of Osceola, Indiana
Respondent.

On Petition For Writ of Certiorari to the Supreme Court of Indiana

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court denied Petitioners their Constitutional due process rights of fair and adequate notice when it granted Summary Judgment by incorrectly deciding the question of law regarding the triggering "event" for the time period within which the Petitioners' remonstrance must be filed under the Indiana Annexation Ordinance Publication statute.

2. Whether the Trial Court misinterpreted and/or misapplied Indiana Code 5-3-1-2(h)which is the Indiana Annexation Ordinance Publication statute.

3. Is the Trial Court's interpretation of the Indiana Annexation Statute Publication requirement inconsistent with Federal and state constitutional safeguards protecting the individual's due process rights of sufficiency of notice and access to the courts.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the court below are named in the caption.

Petitioners James Kirk, And Marcia Kirk, Donna Sue Gall, And Patty Hummer, Together With The Remaining Property Owners Who Are Signatories Hereto And Who Are In the Caption Of This Complaint are the appellants in the Indiana Supreme Court and Plaintiffs in the state trial court. Respondent, The Town Of Osceola, Indiana, is the appellee in the Indiana Supreme Court and the defendant in the state trial court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, James Kirk, And Marcia Kirk, Donna Sue Gall, And Patty Hummer, Together With The Remaining Property Owners Who Are Signatories Hereto And Who Are In the Caption Of This Complaint, respectfully petition for a writ of certiotari to review the decision of the Indiana Appellate Court with Indiana Supreme Court's denial of transfer, without opinion.

OPINION BELOW

The decision of the Indiana Court of Appeals sought to be reviewed is published as *Kirk v. Town of Osceola*, 669 N.E.2d 1060 (Ind.App.1996) is reproduced in the Appendix beginning at A-1. The Supreme Court of Indiana's denial of Appellants' Petition For Transfer is reproduced in Appendix B .

JURISDICTION

The Indiana Court of Appeals decided the case with a written opinion filed August 26, 1996. Appellants' Petition For Transfer was denied by the Supreme Court of Indiana on February 20, 1997. This Petition For Certiorari is being filed within 90 days of that date. This Court has the jurisdiction to review final judgments of state courts pursuant to 28 U.S.C. § 1257(3)(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution are the Due Process and Fair Notice Clauses of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. Relevant Indiana Constitutional provision is *Article I, Section 12 of the Indiana Constitution* which guarantees its citizens access to their court system. Relevant Indiana statutory provisions include I.C. 36-4-3-7; I.C. 36-4-3-11(a) & (c) and I.C. 5-3-1-2 which proscribe the requirements for publication of the Ordinance and timely filing of remonstration. I.C. 5-3-1-2 (h) states:

> "If the event is one about which notice is required to be published after the event, notice shall be published one (l) time within thirty days after the date of the event."

And I.C. 5-3-1-2(i) states:

> "If the event is anything else, notice shall be published two (2) times, at least one (1) week apart, with the second publication made at least three (3) days before the event."

The pertinent part of the Ordinance's language in section 4 is as follows (under I.C. 36-4-3-11 (a) & (c):

> "[T]he annexation of the described territory shall be effective sixty (60) days after the last notice published pursuant to I.C. 5-3-1."

STATEMENT OF THE CASE

Material Facts

This case was an appeal of the lower court's granting of defendant's Motion for Summary Judgment which denied Plaintiffs' remonstration petition and complaint. James and Marcia Kirk, and other remaining property owners of unincorporated Osceola, Indiana oppose being annexed into the Town of Osceola, Indiana. They tried to exercise their right of remonstration by filing their REMONSTRANCE PETITION AND COMPLAINT against the Town of Osceola, Indiana after it passed an Annexation Ordinance. They filed their claim within Sixty (60) Days of the last publication of such Annexation Ordinance. The last publication was May 13, 1993.

On May 3, 1993, the Town of Osceola, Indiana passed the Annexation Ordinance which was the subject matter of the Petitioners' Complaint. After the Annexation Ordinance was passed, the local *MISHAWAKA ENTERPRISE* published the Ordinance on May 6, 1993 and on May 13, 1993. The Petitioners believed that they had sixty (60) days after the last publication of the Annexation Ordinance, which occurred on May 13, 1993, to file their REMONSTRANCE PETITION AND COMPLAINT. Accordingly, such cause of action was commenced on July 8, 1993 in the St. Joseph Superior Court, Indiana.

On December 21, 1993, Defendant filed its "Motion For Summary Judgment" with its "Memorandum In Support Of Motion For Summary Judgment". On March 28, 1994, the Petitioners filed their "Memorandum In Opposition To Defendant's Motion For Summary Judgment". On February 21, 1995, the Honorable William T. Means granted Defendant's "Motion For Summary Judgment".

The Praecipe for Record of the Proceedings was timely filed on the 22nd day of March, 1995. The Record of the Proceedings was then timely filed with the Indiana Court of Appeals on June 19, 1995. On October 4, 1995, Petitioners appealed to the Indiana Court of Appeals arguing among other things that they were deprived of their constitutional safeguards protecting the individual against due process violations of Insufficiency Of Notice and constitutional rights of access to their State Court since the Indiana Annexation Statute Publication requirement is unconstitutionally vague as it lends itself to more than one interpretation.

The Indiana Court of Appeals decided the case with a written opinion filed August 26,1996. The written opinion was against Appellants. The Indiana Court of Appeals upheld the Town of Osceola's interpretation of the pertinent Notice Statutes. No petition for rehearing was filed with the Court of Appeals.

The Petitioners filed for Petition For Transfer to the Supreme Court of the State of Indiana by stating that the written opinion of the Court of Appeals was in error for each of the following reasons:

A. The opinion of the Court of Appeals contravenes ruling precedent of the Indiana Supreme Court espousing the issues of fair play and protection of citizens from the powers of an overreaching governmental entity. In its opinion, the Appellate Court ignored the issues of procedural fair play and due process. The Indiana Supreme Court has long upheld that the principles of fundamental fairness and proper notice need to be satisfied in order to empower the small private citizen an opportunity to combat the overpowering governmental entity. Town of Argos v. Ritz Craft Realty, Inc., 238 N.E.2d 14, 250 Ind. 562 (1968). See also McKee v. Town of Pendleton, (1904), 162 Ind. 667, 69 N.E. 997. In McKee, the Court subscribed to the proposition that procedural fair play and due process, especially when dealing with a citizen's constitutional property rights and fair taxation, warrants at least more than one publication notice. In essence, the Appellate Court foreclosed the Appellants-Plaintiffs' fair access to judicial redress by adopting a contrary interpretation of the Annexation and Publication Notice Statutes relied upon by the Appellants-Plaintiffs. The Appellate Court's failing in allowing for a proper interpretation of the Indiana Statutes shocks the conscience of fairness and due process. Such an approach by the Appellate Court contravenes the consummate mandate

of the Indiana Supreme Court that, as stated by Justice J. Dickson: "The openness of Indiana courts is a foundational policy objective expressly recognized in *Article I, Section 12 of the Indiana Constitution.*" Pence v.State of Indiana, No. 49S00-9406-CV-579, Indiana Supreme Court, June 20, 1995 at Page 3. See also Klein v. City of Indianapolis By and Through Its BOARD OF FLOOD CONTROL COMMISSIONERS, 224 N.E.2d 42, 248 Ind. 117 (Ind. 1967).

B. There is a conflict between the written opinion and prior opinions of the Court of Appeals such as found in Plumblee v. Monroe Guaranty Insurance Co., 655 N.E.2d 350, 355 (Ind. App. 1995); Bemis v. State, 652 N.E. 2d 89 (Ind. App. 1995); Wesner v. Metropolitan Development Com'n of Marion County, 609 N.E.2d 1135, 1139 (Ind.App. 1 Dist. 1993); National Salvage & Service Corp. v. Commissioner of Indiana Dept. of Environmental Management, 571 N.E.2d 548, 555 (Ind.App. 4 Dist. 1991); Citizens Gas and Coke Utility v. Wells, 275 N.E.2d 323, 326, 150 Ind. App. (Ind.App. 1971); and Board of Com'rs of Howard County v. Kokomo City Plan Commission, 310 N.E.2d 877, 892 (Ind.App. 2 Dist. 1974). In those prior opinions of the Court of Appeals has consistently favored reviewing the citizen's basic constitutional rights of fair play and due process along with a willingness to properly review statutory construction to determine whether the actual construction of the statute leads to confusion. The written opinion of the Indiana Court of Appeals in the present case dispenses with those responsibilities of constitutional review for the sake of fundamental fairness and due process and instead bases its opinion of the Court's misinterpretation of

the requisite statute concerning the interpretation of what constitutes the "triggering event", what is meant by "last publication", and the impact of those confusing terms on the citizens' fair understanding of what the law expects of them. Appellants-Petitioners felt that the words "last publication" inferred that more than one publication occurs before the 60-day time allowance begins to run. The consequence is, as stated by the Indiana Court of Appeals, in another opinion, is nothing less than a "manifest perversion of [their] constitutional [rights]." Board of Com'rs of Howard County v.Kokomo City Plan Commission, 310 N.E. 2d 877, 892 (Ind.App. 2 Dist. 1974).

Further, Petitioners felt there was a conflict between the written opinion and prior opinions of the Court of Appeals in Place v. Sagamore Center, Inc., 604 N.E.2d 671, 673 (Ind.App.1 Dist. 1992), *citing T.R.56(H)*. See also Warren v. WLT Corporation, 653 N.E. 2d 1054, 1056 (Ind.App. 1995). In the Place opinion the Appellate Court has determined that for a genuine issue of material fact to exist "...where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." Place v. Sagamore Center, Inc., 604 N.E.2d 671, 673, (Ind.App. 1 Dist. 1992).

This Opinion is also contrary to the well-established rule regarding rendering decisions on Summary Judgment in compliance with these standards that if the Court has any "doubts concerning the existence of a genuine issue of material fact, we must resolve those doubts in favor of the nonmoving party." Place at 673. This Opinion goes against the Appellate Court's own cautionary approach to the significant impact of a Summary Judgment foreclosing the individual's further access to the courts as it undertakes its responsibility with a self-imposed caveat that since it has rendered rulings recognizing that a Summary Judgment is a "lethal weapon" so it must "beware of overkill in its use." Place at 673.

The Supreme Court of the State of Indiana denied Appellants' Petition For Transfer on February 20, 1997 without a written opinion.

REASONS FOR GRANTING THE PETITION

The decision of the Indiana Appellate Court is in conflict with the decisions of other state and Federal appellate courts which guarantee the citizen his consummate constitutional due process rights of fair and proper notice, especially when it involves actions by an overpowering government. In its decision, the Indiana Appellate Court accepted the "governmental" interpretation of the statute without any review of the actual language of the unconstitutionally vague Indiana statutes which lead to the confused and ambiguous interpretation of the number of notice publications required for the citizen remonstration against the governmental annexation process. Appendix "A-2". And, the Supreme Court of Indiana's denial of transfer further leaves critical constitutional issues of statutory interpretation and ambiguity unresolved. The result is the endorsement of an unfair interpretation of a confusing and ambiguous annexation statute allowing for governmental actions without regard to the due process rights of its citizens.
Review by this Court is necessary for the sake of the public interest as the ultimate protector of the citizen from arbitrary conduct by an overpowering government and is necessary in order to stop the creation of vague and ambiguous laws behind which some governmental entities have chosen to hide.

I. The Decision That Sides With The Government's Interpretation Of A Confusing And Ambiguous State Statute Deprives The Citizens Of Their Fundamental Constitutional Rights Of Fair And Proper Notice And Due Process - Especially Involving The Citizens' Fifth And Fourteenth Amendment Property Rights.

There are compelling issues of denial of due process and fair notice which warrant certiorari review. The most basic right guaranteed the United States citizen by the United States Constitution is being "entitled to fair notice in dealing with his government . . . [.]" *Wisconsin Electric Power Co. v. Occupational Safety and Health Review Com'n,* 567 F.2d 735, 741(C.A. 7 1977). The Federal Court has declared governmental ordinances and statutes "void for vagueness" because "[a]s a matter of due process, 'no one may be required at peril of life, liberty or property to speculate as to the meaning of . . . statutes. . . .' " *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 155 (C.A. 7 (Ill.) 1990), *citing Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976) (citations omitted).

The above-stated issues of Federal Constitutionality attach to the state of Indiana by way of the 14th Amendment, because of the Indiana Trial Court's Summary Judgment grant based on its misinterpretation and misapplication of an Indiana Annexation Statute which is fundamentally unconstitutionally vague. Such application by the Indiana Courts is also contrary to the rights of the Indiana citizen as protected by *Article I, Sec. 12 of the Indiana Constitution* guaranteeing its citizens access to their court system As Justice J. Dickson affirmed: "The openness of Indiana courts is a foundational policy objective expressly recognized in *Article I, Section 12 of the Indiana Constitution.*" Pence v. State of Indiana, No. 49S00-9406-CV-579, Indiana Supreme Court, June 20, 1995 at Page 3.

The Petitioners assert that the language of the pertinent statute is so fundamentally vague on its face that it lends itself to a conflict in interpretation of what constitutes the statute's triggering "event" for the period of time to run. (R. 46). The Petitioners stated that the language in Section 4 of Ordinance Number 2, is similar to the language found in I.C. 36-4-3-11(2) except they found one critical difference: "The statute merely states

that remonstrance must be filed within 60 days after 'the publication' while, on the other hand, the Ordinance itself states that it shall be effective sixty (60) days after the ': **last publication**' ." (R. 46). (Emphasis added). The Petitioners further state that the "two are not the same, for while 'publication' is neutral as to the number of insertions, 'last publication' suggests that there will be more than one." (R. 46).

The Petitioners' argument is strongly supported by the wording of the Ordinance in and of itself. (R. 46). The pertinent part of the Ordinance's language in section 4 is as follows:

> "[T]he annexation of the described territory shall be effective sixty (60) days after the **last notice published** pursuant to I.C. 5-3-1."
> (R. 53).(Emphasis added).

The trial Court, Indiana Appellate Court and the Supreme Court of Indiana have failed collectively in their responsibilities to the citizen to review the meaning of language used in the statute and in their collective duty is to construe such language by giving effect to its plain ordinary meaning. *Bowen v. Review Board of Indiana Employment Security Division*, 362 N.E.2d 1178, 173 Ind. App. 166 (1977).

The Petitioners correctly demonstrated that the word "last" implies an expectation of more than one with their reference to Webster's New Collegiate Dictionary (9th ed. 1979). (R. 53). In addition, the Petitioners correctly contend that the pertinent Statutes themselves lend to more than one interpretation and therefore to unfair confusion. (R.46). Indiana Statutes I.C. 36-4-3-7 and I.C. 5-3-1-2 provide the requirements for publication of the Annexation Ordinance. (R. 46). In addition, the Petitioners assert that annexation ordinances are not listed specifically in I.C. 5-3-1-2. (R.46).

In order to determine when the time period for remonstration takes effect, the Petitioners indicate that they have to interpret what kind of "event" the annexation process is and which category, or subsection, the process belongs to. (R. 46). The Petitioners point out that paragraphs (a) through (g) refer to specific types of "events" which includes public hearings, sale of bonds or receipt of bids. (R. 46). The Petitioners assert that, therefore, it is only by "process of elimination" that they are left with two "catch-all" paragraphs of (h) and (i). (R. 46 - 47). As the Petitioners point out, each section states as follows: Paragraph (h) [i.e. I.C. 5-3-1-2(h)] states:

> "If the event is one about which notice is required to be published after the event, notice shall be published one (l) time within thirty days after the date of the event." (R. 47).

And I.C. 5-3-1-2(i) states:

> "If the event is anything else, notice shall be published two (2) times, at least one (1) week apart, with the second publication made at least three (3) days before the event." (R. 47).

The Petitioners then properly inquire as to which category an annexation ordinance best fits. (R.47). What makes this even more problematic is that the Petitioners found that the word "event" is not specifically defined anywhere within I.C. 5-3-1 et seq. (R. 47). Thus, construction of another term in the statute, the word "event", has to be interpreted with the likely result being, again, more than one interpretation.

This is why the Court was left with the obligation to render an interpretation of ambiguous and unclear statutory language for the sake of fair notice. *Bowen v. Review Board of Indiana Employment Security Division*, 362 N.E.2d 1178, 173 Ind. App. 166 (1977). In accordance with *Bowen*, the Court was called upon to construe the statute by giving effect to the plain ordinary meaning of the language used. The United States Supreme Court has likewise ruled that "words of a statute" must be given their common "ordinary meaning". *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 465, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968). *Banks* further imposed a responsibility upon the parties seeking to attribute anything other than an "ordinary meaning" to the statute to provide persuasive reasons for a "contrary" interpretation. *Id. See also Malat v. Riddell*, 383 U.S. 569, 571, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966).

The Petitioners assert that the meaning of "event" is the date on which the ordinance will take effect and become enforceable which cuts off the date for review. (R. 47). They correctly assert this as the best interpretation since they find that "event" is defined as "the consequence of anything; the issue or outcome of an action as finally determined; and that in which an action, operation, or series of operations, terminates." *citing* Black's Law Dictionary, (5th Ed 1979) and Webster's New Collegiate Dictionary (9th ed.1983) which states that an "event" is "the final outcome or determination of a legal action." (R. 47).

Instead, the Indiana Courts accepted the Town of Osceola interpretation that the "event" was the actual passage of the ordinance which the Town of Osceola contended fell within section (h) which required only one publication.(R.38 & 48).

The Petitioners contend that this interpretation is not only inconsistent with the "plain language" doctrine espoused by the *Bowen* court, it is also in direct conflict with *Southport Board of Zoning Appeals v. Southside Ready Mix Concrete,* 176 N.E.2d 112, 114, 242 Ind. 133 (1961), which declares an "event" as having a final effect of enforceability on the citizens only after it becomes law. *Southport Board* at 114.(Emphasis added). The Petitioners assert that the interpretation allowed by the Indiana Court is contrary to the policy upheld by *Southport Board* which is the purpose of a statute requiring publication of ordinances "is to inform the public of the effectiveness of the adopted ordinance." *Southport Board* at 114. The Petitioners subsequently contend that the

Southport Board interpretation is consistent with the language of I.C. 36-4-3-7(a) *et seq.* which ignores the date of passage and instead focuses exclusively on when and how ordinances **actually take effect**. (R. 48). (Emphasis added).

The conflict in interpretation of the number of required publications of an ordinance triggering the citizens' rights to file a timely remonstration petition against annexation within the Indiana ordinances and statutes, particularly I.C. 5-3-1-2 (h), is the basis of the fundamental issue of proper and fair notice required in assuring the citizens their due process rights. Since the language is so confusing, the predictable outcome was such a ruling as this against the citizens thus obstructing their constitutional due process rights and their constitutional right of access to their state Court. Here, the vigilant citizen did not receive have fair and sufficient notice in order to properly comply and therefore were denied their most fundamental constitutional property due process right to be heard on issues involving governmental intrusion on those property rights - especially when the question of greater taxation obligations attaches to those inherent property rights issues. This conduct is particularly contrary to the United States Supreme Court's protection of the citizen's consummate constitution right to his or her day in Court. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

Indiana Courts have declared that statutes that lack the inherent fairness of providing the citizen with fair notice have been ruled "unconstitutionally vague". *See, e.g., National Salvage & Service Corp. v. Commissioner of Indiana Dept. of Environmental Management*, 571 N.E.2d 548, 555 (Ind.App. 4 Dist. 1991); *Citizens Gas and Coke Utility v. Wells*, 275 N.E.2d 323, 150 Ind.App.78 (Ind.App.1971) at 326. Yet, I.C. 5-3-1-2(h) proved to be so confusing and vague in its language and application it failed to provide the basic standards of fair and sufficient notice in order to avoid obstructing the Petitioners' access to I.C. 36-4-3-11(a) & (c) in order to satisfy their basic constitutional right to be heard on their fundamental property right issues. The consequence, as it stands now, is nothing less than a "manifest perversion of [their] constitutional [rights]" as found to exist in *Board of Com'rs of Howard County v. Kokomo City Plan Commission*, 310 N.E.2d 877, 892 (Ind.App. 2 Dist. 1974).

The United States Supreme Court upholds the citizen's fundamental right to due process protections based on constitutionally understandable statutes or regulations that give the citizen "fair notice of what conduct is required . . . . or [they are] unenforceable for indefiniteness." *Wisconsin Electric Power Co. v. Occupational Safety and Health Review Com'n*, 567 F.2d 735, 740 (C.A. 7 - 1977) *citing Buckley v. Valeo*, 424 U.S. 1, 77, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976). According to *Wisconsin*

Electric, if terms of a statute are "so vague that persons of common intelligence must guess at its meaning and differ as to its application violates the constitutional requirements of due process and cannot stand." *Wisconsin Electric* at 740. *See also United States v. Tandaric*, 152 F.2d 3 (7th Cir. 1945); *Cicero v. Olgiati*, 410 F.Supp. 1080, 1093 (S.D.N.Y. 1976); *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 683, 58 L.Ed.2d 596 (1979). The *Colautti* decision indicated that statutes that induce the kind of uncertainty that "threatens to inhibit the exercise of constitutionally protected rights" must be declared "void for vagueness." *Colautti* at 391, 99 S.Ct. at 683. *See also Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926)(statute deemed vague when "men of common intelligence must necessarily guess at its meaning"); *Texas Eastern Products Pipeline Co. v. Occupational Safety and Health Review Com'n*, 827 F.2d 46, 51 (C.A. 7 1987) (strong dissenting opinion by Circuit Judge Manion). Federal Courts have consistently upheld the policies behind assuring clear and unambiguously drafted statutes which provide "explicit standards" in order to guarantee all of the citizen's constitutional protections. *See, e.g., Waldron v. McAtee*,

723 F.2d 1348, 1358 (C.A. 7 (Ind.) 1983). According to *Waldron*, "uncertain meanings will lead citizens to 'steer far wider of the unlawful zone than if the boundaries of the boundaries of the forbidden areas were clearly marked." *Id.* at 1358 *citing Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

The United States Supreme Court has affirmed that "a law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions inasmuch as the fundamental defect is not the penalty but the exaction of obedience to a . . . standard so vague and indefinite as to be no . . . standard at all." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982). Such is the situation at present in this case.

Therefore, the compelling issues of denial of due process and fair notice warrant certiorari review. U.S.SUP.CT. R. 10(b).

CONCLUSION

WHEREFORE, for the above-stated reasons, the petition for writ of certiorari should be granted.

Dated: May 20, 1997

Respectfully submitted,

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APPENDIX

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APPENDIX A

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IN THE
COURT OF APPEALS OF INDIANA

JAMES KIRK, MARCIA KIRK, DONNA)
SUE GALL, PATTY HUMMER, ET AL.,)
)
Appellants-Plaintiffs,)
)
vs.) No. 71A03-9506-CV-203
)
THE TOWN OF OSCEOLA, INDIANA,)
)
Appellee-Defendant.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William T. Means, Judge
Cause No. 71D07-9307-CP-10138

August 26, 1996

OPINION - FOR PUBLICATION

HOFFMAN, Judge

Appellants-plaintiffs, James Kirk, Marcia Kirk, Donna Sue Gall, and Patty Hummer et al.,[1] appeal the entry of summary judgment in favor of defendant-appellant Town of Osceola, Indiana. The facts relevant to review are recited below.

Essentially, the parties agree on the facts but differ as to the application of the law to the facts. On May 3, 1993, the Town of Osceola, Indiana passed an ordinance approving the annexation of real property situated adjacent to Osceola. Donna Reinholtz the Osceola Town Clerk contacted the Mishawaka Enterprise, a newspaper which publishes legal notices in the area, to request that the annexation ordinance be published once.

Vivian Wilson, a newspaper employee, consulted a guide-book for publication of legal notices which indicated that the annexation notice should be published twice. When an attempt to contact Reinholtz failed, Wilson contacted an employee of the Mishawaka Clerk's office who informed Wilson that the standard practice is to publish legal notices twice. Wilson scheduled the notice to appear twice: on May 6, 1993 and on May 13, 1993. Osceola was billed for two publications.

Remonstrance petitions contesting annexation ordinances must be filed within 60 days of the date of publication of the annexation ordinance. The remonstrators, who are landowners affected by the annexation, filed their complaint on July 8, 1993. The petition would be timely only if the 60-day period commenced on May 13, 1993.

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[1] Counsel for appellants is directed to review Ind. Appellate Rule 8.2.

Osceola filed a motion for summary judgment contending that the remonstrators failed to timely file their petition, inasmuch as only one notice was required by the statute; thus, the time period commenced on May 6, 1993 and the May 13, 1993 notice was superfluous. The remonstrators responded by contending that the petition was timely filed or, in the alternative, that Osceola should be estopped from asserting the time limitation because the notice was published twice.

On February 21, 1995, the trial court granted Osceola summary judgment. This appeal ensued. Other facts appear below as necessary for consideration of the appeal.

The remonstrators raise several issues for review. The dispositive issue is whether the second notice was superfluous based upon the notice and the governing statute.

When reviewing an entry of summary judgment, this Court uses the same standard used by the trial court. Ramon v. Glenroy Const. Co., Inc., 609 N.E.2d 1123, 1127 (Ind. Ct. App. 1993) trans. denied. Summary judgment is appropriate only when the evidentiary matter designated by the parties shows that there is no genuine issue as the any material fact, and the moving party is entitled to judgment as a matter of law. Id.; Ind. Trial Rule 56(C). Even if it appears that the non-moving party will not succeed at trial, summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting inferences. Fidelity Financial Services v. Sims, 630 N.E.2d 572, 574 (Ind.Ct.App.1994). Where, as here, the material facts are not in dispute, the issue is the application of the law to the facts. See id.

The notice states: "[T]he appropriate portions of this Ordinance shall be published as soon as is practicable, and the annexation of the described territory shall be effective sixty (60) days after the last notice published pursuant to I.C. 5-3-1."

IND. CODE *S*5-3-1-2(h)(1990 Supp.) provides:

> If the event is one about which notice is required to be published after the event, notice shall be published one (1) time within thirty (30) days after the date of the event.

Remonstrators focus upon the portion of the notice stating that the annexation would become effective 60 days after the "last notice published." Osceola contends that the last notice was superfluous. Placed in context, the notice states that the effective date is 60 days after the "last notice published pursuant to I.C. 5-3-1." The statute requires the publishing of only one notice. That the newspaper staff determined from outside sources that publication twice would be appropriate does not alter the plain meaning of the governing statute or the instructions given by the Osceola executive.[2] The second notice was not effective, inasmuch as the first and only notice required triggered the 60-day period. The petition filed by the remonstrators was not timely.

The Judgment of the trial court is affirmed.

Affirmed.

GARRARD, J., and BAKER, J., concur.

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2 That the taxpayers should not be required to pay for additional notices not required is evidenced by IND. CODE *S* 36-2-2-25 (1988 Ed.) stating: "Whenever publication of a notice, report, or statement of any kind is required and a county is liable for the cost of that publication, the executive may not make or pay for publication in more than one (1) newspaper unless publication in two (2) newspapers is required. A person who violates this section commits a Class C infraction."

APPENDIX B

STATE *of* **INDIANA** SEAL OF THE

STATE OF INDIANA
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Cause Number
71A03-9506-CV-00203
Lower Court Number:
71D049311CP10727

KIRK, JAMES & MARCIA ETAL -V- TOWN OF OSCEOLA, INDIANA

You are hereby notified that the SUPREME COURT has on this day 2/20/97
APPELLANT'S PETITION FOR TRANSFER IS HEREBY DENIED.
RANDALL T. SHEPARD, CHIEF JUSTICE
ALL JUSTICES CONCUR AA

WITNESS my name and the seal of said Court,

this 20TH day of FEBRUARY, 1997

/s/ H. John Okeson
H. JOHN OKESON
Clerk Supreme Court, Court of Appeals and Tax Court

cr-er49